BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DOUGLAS R. PETTY	)	
Claimant	)	
v.	)	
	)	Docket No. 1,074,680
COUNTY OF SALINE	)	
Respondent	)	
and	)	
	)	
KANSAS WORKERS RISK COOP FOR COUNTIES	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the January 20, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Claimant appears by counsel, John M. Ostrowski of Topeka, Kansas. Respondent, and its insurance carrier (respondent), appears by counsel, Ronald J. Laskowski of Topeka, Kansas.

ISSUES

The ALJ denied claimant's request for medical treatment because he failed to prove he sustained a personal injury by accident arising out of and in the course of his employment on November 5 and 6, 2014, while bouncing up and down operating a tractor mower.

Claimant asserts he sustained a back sprain/strain, a new personal injury, as a result of his work accident.

Respondent requests the Board affirm the preliminary hearing Order. Respondent asserts claimant did not sustain a personal injury and that his accident solely aggravated a preexisting condition. Respondent points out claimant had a prior back condition as evidenced by a 2005 MRI showing multi-level disc degeneration and an L5-S1 disc herniation.

The issue is: did claimant sustain a personal injury by accident arising out of and in the course of his employment?

FINDINGS OF FACT

Prior to November 2014, claimant was employed by respondent for seven years and was an equipment operator the past year. On November 5 and 6, 2014, claimant was mowing over rough terrain while driving a tractor with an attached brush hog. He began experiencing low back pain on November 5, which continued for two or three days. He did not immediately seek medical treatment and later went to the emergency room because he could not walk. At the emergency room, claimant was referred to Dr. Dennis Woodall who provided pain medication. After undergoing physical therapy and an MRI ordered by Dr. Woodall, claimant was referred to Dr. Boswell, who ordered three injections and saw claimant three times. Claimant missed two work days and worked light duty performing data entry for about one month.

Claimant underwent a previous lumbar MRI in 2005, but did not recall having back issues in 2005 or the MRI. Nor did claimant recall going to doctors or chiropractors, undergoing x-rays or falling. He did not remember how long he had back pain in 2005 or anything about what occurred. According to claimant, he received no treatment for his back between 2005 and November 2014, and had no back issues when he went to work for respondent. He admitted not telling any treating physician about his 2005 MRI or being diagnosed with a herniated disc. Claimant indicated he only remembered the 2005 MRI the day before he was deposed, when he saw a note of Dr. Woodall.

Claimant testified he never told Dr. Boswell about having back problems, because the doctor never inquired about prior back problems. He admitted reporting tweaking his back while operating a tractor to Dr. Boswell. Claimant explained when he saw Dr. Boswell a second time, he was operating a motor grader and reinjured his back. Claimant reported the incident to respondent and respondent made an appointment for him with an occupational therapist. Claimant did not remember when the incident occurred.

Claimant also did not remember an incident in May 2015 when his knee gave out lifting furniture and he had increased back pain that was documented in notes of Dr. Boswell's nurse. Claimant smokes and acknowledged Dr. Boswell indicated smoking was a big component of his back pain.

Claimant sent a letter to Dr. Woodall asking him to check one of two statements indicating whether, in his opinion, claimant's mowing activities were or were not the prevailing factor with regard to his back pain and need for treatment. Dr. Woodall checked the statement indicating claimant's mowing activities were the prevailing factor and added a handwritten note stating, "However, MRI in 2005 showed numerous bulges at several levels and R disc herniation at L5-S1."[1] Dr. Woodall did not testify. His office notes or the results of the MRI he ordered were not placed into evidence.

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[1] P.H. Trans., Cl. Ex. 1 at 2.

Claimant first saw Dr. Boswell on March 4, 2015, and reported having low back pain and radiculopathy for the past four months. Claimant reported tweaking his back while operating a motor grader last November. Claimant's pain was initially severe and sharp with radicular symptoms into the left leg. His pain currently was a dull ache localized in his low back, more on the right side with occasional pain into the right leg. Notes from the visit do not indicate claimant was asked if he had prior back symptoms, nor did it indicate he reported any prior back symptoms. Dr. Boswell indicated he reviewed claimant's most recent MRI, which showed degenerative changes at multiple levels and a small disc herniation at L5-S1. Under "Impression," Dr. Boswell stated, "I do not see any spinal cord or nerve root compression. I believe the source of his pain is multiple pathologies, both degenerative changes and muscular in nature."[2]

Claimant saw Dr. Boswell again on May 28, 2015, and mentioned having an episode where he lifted a piece of furniture and his knee gave out. The doctor's May 28 notes state, "We had a long discussion in regards to smoking cessation which I also believe this can amount to a lot of his low back pain."[3] The doctor, in notes from claimant's final visit on November 3, 2015, stated, "I believe that the injury at work is the prevailing factor for his pain, due to the fact that his pain started after an injury at work. The patient does have some degenerative changes as well."[4] The doctor also indicated he did not see any acute findings. The notes from those visits make no mention of preexisting back symptoms. Dr. Boswell did not testify.

Respondent placed into evidence an affidavit from Amanda Chamberland, a claim adjustor for Cornerstone Risk Solutions, LLC. The affidavit indicated Ms. Chamberland spoke to claimant on January 14, 2015, as part of her investigation of the claim. According to Ms. Chamberland, claimant denied having any back injury, symptoms or treatment prior to his November 6, 2014, injury.

During the preliminary hearing, the parties sparred over whether claimant's attorney refused to allow claimant's discovery deposition to be taken. In another claim involving claimant, an IME with Dr. Fanning was ordered. An email authored by claimant's counsel placed into the record by respondent, over claimant's objection, indicated claimant's deposition would not be set until the IME with Dr. Fanning was scheduled.

Respondent's attorney asserted he could not obtain claimant's medical records, because claimant's attorney refused to sign an order for production of records. The order for production of records and a letter requested claimant's attorney sign said order were placed into evidence over claimant's objection. Claimant's attorney indicated he refused

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[2] *Id.* Cl. Ex. 2 at 5.

[3] *Id.* Cl. Ex. 2 at 8.

[4] *Id.* Cl. Ex. 2 at 11.

to sign the order for production of documents because it was overly broad and asserted respondent had an order in the other claim permitting him to obtain claimant's medical records. Respondent argued it was denied an opportunity to investigate claimant's medical past because claimant's attorney refused to sign the order for production of records and allow claimant's deposition. Respondent did not request a continuance or any other relief.

In their respective briefs to the Board, the parties addressed the refusal of claimant's attorney to allow claimant's deposition and sign the order for production of records. Neither party listed the foregoing as issues in their briefs. Simply put, the foregoing were not issues raised before the ALJ and will not be addressed by the Board.[5]

At the preliminary hearing, the ALJ provided a rationale for his ruling:

> Well, when it comes down to it, Dr. Boswell acknowledges he can't find any acute changes, any acute findings. And Dr. Woodall says claimant has the same or similar disc bulges and herniations in his spine as were seen in 2005. Neither identifies an injury, a change in the physical structure of the body. Each opines that the work activity, mowing, was the prevailing factor in causing the ongoing pain, And I don't dispute that it probably was, but that doesn't necessarily rise to the level of personal injury as defined in the Act. And there's no evidence there is a lesion or change in the structure of the body.[6]
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> . . .
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> I'm going to deny the request for additional treatment at this time, and find that the claimant has failed to sustain his burden of proof of suffering personal injury, a change in the physical structure of the body by accident, arising out of and in the course of his employment. I'm going to find that we have what appears to be aggravation of a preexisting condition, and that the same physical findings were made on MRI in 2005. And those, facts, that information was not made available to Dr. Boswell before he rendered his prevailing factor opinion, and that renders the prevailing factor opinion suspect, in my opinion.[7]

When claimant argued his work accident caused a back sprain/strain that he did not have previously, the ALJ responded by stating:

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[5] *Byers v. Acme Foundry, Inc.*, No. 1,056,474, 2013 WL 6382905 (Kan. WCAB Nov. 21, 2013). See also *Hunn v. Montgomery Ward*, No. 104,523, 2011 WL 2555689 (Kansas Court of Appeals unpublished opinion filed June 24, 2011).

[6] *Id.* at 35.

[7] *Id.* at 38.

> Well, Dr. Woodall says, I feel that the mowing activity is the prevailing factor with regard to his back pain and need for treatment. Doesn't diagnose strain sprain. Doesn't say he suffered some sort of injury while mowing. Just that it's the prevailing factor in causing his back pain.
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> And the statute says that an aggravation of a preexisting condition without a lesion or change in structure of the body is not compensable.[8]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[9] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[10]

The ALJ determined claimant did not sustain a personal injury because he did not sustain a lesion or change in the structure of his body. The ALJ found claimant's accident is not compensable because it aggravated a preexisting condition. The ALJ noted Dr. Woodall opined claimant's accident was the prevailing factor for his back pain, but not for his injury and that Dr. Boswell was unaware of claimant's prior back condition and 2005 MRI.

Prior to the 2011 amendments, K.S.A. 44-508(e) contained a clause that stated: "It is not essential that such lesion or change be of such character as to present external or visible signs of its existence." That clause was omitted in the 2011 amendments, and the Kansas Legislature now defines personal injury in K.S.A. 2014 Supp. 44-508(f)(1), which states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

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[8] *Id.* at 36.

[9] K.S.A. 2014 Supp. 44-501b(c).

[10] K.S.A. 2014 Supp. 44-508(h).

In *Gilbertson,*[11] the employer argued claimant did not sustain a lesion or change in the physical structure of the body, causing damage or harm thereto. All four physicians who examined claimant indicated he sustained a left knee injury as the result of his 2011 work accident. Drs. Fevurly, Gilbert and Jones believed claimant incurred a knee sprain. Dr. Prostic opined claimant tore his left meniscus. A majority of the Board found claimant's knee sprain resulted from a structural change in the body and held the overwhelming medical evidence proved claimant sustained a left knee injury at work.

In *Hawkins,*[12] the Board stated:

> First, K.S.A. 2012 Supp. 44-508(f)(1) does not require lesions or changes in the physical structure of the body to be verified by imaging studies, such as an x-ray or MRI scan. Second, the statute does not state pain is insufficient proof of an injury. To be clear, pain is subjective and cannot be "validated or measured objectively." (Citation omitted.) A complaint of pain can be viewed with "suspicion and disbelief." (Citation omitted.) Pain complaints alone do not necessarily mean an injury occurred. Despite the potential need for caution against baldly accepting pain complaints as valid, a claimant's report of pain should be considered along with all other facts in assessing whether an injury occurred. It is consistent for an injured person to complain about pain. The absence of pain complaints would go further to disprove an injury than the presence of pain complaints. We also view the facts as establishing claimant proved he sustained personal injury as defined by K.S.A. 2012 Supp. 44-508(f)(1).

In *Hernandez,*[13] a Board Member determined Ms. Hernandez did not sustain a new lesion or change to the physical structure of her body. In 2008, Ms. Hernandez injured her low back. A lumbar spine MRI revealed central disk bulges and radial tears at L4-5 and L5-S1 and a micro diskectomy was performed. Ms. Hernandez testified she was asymptomatic after she was released in 2009, until she injured her back again on September 20, 2012. She was diagnosed with a back strain. Another MRI was performed in October 2012. Dr. Mellion evaluated Ms. Hernandez and indicated there were no significant changes from the 2009 MRI. Dr. Stein evaluated Ms. Hernandez and opined her work injury was the primary and prevailing factor in her current symptoms and need for treatment. Ms. Hernandez argued her new and different symptoms had to have been caused by a change in the physical structure of the body. A Board Member ruled claimant failed to prove she sustained a lesion or change to the structure of her body, stating:

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[11] *Gilbertson v. Casey's General Store,* No. 1,060,639, 2015 WL 8006357 (Kan. WCAB Nov. 30, 2015).

[12] *Hawkins v. Goodyear Tire & Rubber Company,* No. 1,064,097, 2015 WL 996899 (Kan. WCAB Feb. 23, 2015).

[13] *Hernandez v. Subway,* No. 1,064,281, 2013 WL 4051835 (Kan. WCAB July 3, 2013).

> As observed by Judge Moore, neither neurosurgeon documented a lesion or change in the physical structure of claimant's body. While claimant explained why and how her current symptoms are new and different as compared to her preexisting condition, the law in effect from May 15, 2011 forward requires a documented lesion or physical change in the body.[14]

In *Krueger,*[15] the employer contended Ms. Krueger did not sustain an injury because her work accident did not cause a new lesion or change in the physical structure of her body, but rendered a preexisting condition symptomatic. Ms. Krueger argued her pain was evidence of a legion or change in the physical structure of the body. Stated another way, if a person has pain, there must have a change in the structure of the body. The Board disagreed, stating:

> Drs. Stein and Estivo, after reviewing claimant's pre-accident and post-accident MRIs and/or MRI reports, concluded there was no change in claimant's physical structure. Only Dr. Prostic came to the opposite conclusion. The Board finds the opinions of Drs. Estivo and Stein more credible than those of Dr. Prostic. Dr. Stein, a neutral physician appointed by the ALJ, was the only physician who reviewed both MRI films. Moreover, Dr. Prostic testified he thought there was a change in physical structure because claimant was told previously by a radiologist and treating physicians she had bulging discs before, but now had a herniated disc. The basis for his opinion is suspect.
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> Claimant asserts a change in physical structure may not be visible on an MRI. Claimant argues because she had pain, there must be a change in her physical structure, and, therefore, she sustained personal injury. The Board disagrees. Not all pain arises from a change in physical structure. Because an asymptomatic preexisting condition becomes symptomatic does not necessarily mean there was a change in physical structure. If claimant's logic were adopted, any time an injured worker had pain from a work injury, he or she would have a change in physical structure and would have sustained personal injury as defined by K.S.A. 2012 Supp. 44-508(f)(1).
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> The Board finds claimant failed to prove she sustained personal injury by accident, as there is insufficient evidence claimant had a change in her physical structure as a result of her July 2012 accident. With respect to this issue, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

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[14] *Id.*

[15] *Krueger v. Kwik Shop, Inc.*, No. 1,062,995, 2015 WL 996896 (Kan. WCAB Feb. 27, 2015).

The Kansas Court of Appeals affirmed, stating, "Substantial competent evidence supports the Board's conclusion the injury was not compensable because it solely aggravated, accelerated, or exacerbated Krueger's preexisting condition."[16]

Although the above cases are instructive on the issue at hand, they are distinguishable from the present case. In all of the aforementioned cases, physicians provided opinions that the injured workers' accidents were not the prevailing factor and the workers did not sustain a change or lesion to the physical structure of the body. In the present matter, both physicians gave prevailing factor opinions that favored claimant. Neither physician specifically commented that claimant did or did not sustain a change or lesion to the physical structure of the body.

This is a close case. The ALJ rationalized that just because claimant's work activity is the prevailing factor for his back pain, does not necessarily mean he had a change or lesion to his body structure. That rationale is sound. However, in this instance claimant proved he sustained a lesion or change in his body structure, a personal injury. Dr. Boswell opined claimant's source of pain was multiple pathologies, both degenerative changes and muscular in nature. Dr. Boswell also opined claimant's work injury was the prevailing factor causing pain. To this Board Member, Dr. Boswell's records indicate he believed claimant sustained an injury at work that was the prevailing factor for his back pain and that said injury, in part, was muscular in nature.

K.S.A. 2014 Supp. 44-508(f)(1) does not require lesions or changes in the physical structure of the body to be verified by imaging studies. Here, claimant sustained a muscular injury, which would not necessarily be verifiable by a diagnostic test. As a fellow Board Member noted in *Hawkins*,[17] a claimant's report of pain should be considered along with all other facts in assessing whether an injury occurred. Claimant testified he had pain from mowing on November 5, worked a couple of days and went to the emergency room later because he could not walk. That corroborates the opinion of Dr. Boswell that claimant had a work injury, muscular in nature.

There is insufficient evidence in the record that claimant's work activities solely aggravated, exacerbated or accelerated his back condition. As stated above, Dr. Boswell opined claimant's source of pain was multiple pathologies, both degenerative changes and muscular in nature. Dr. Boswell did say he did not see any acute findings, but never stated claimant had no acute changes. Dr. Woodall did comment that claimant's 2005 MRI showed numerous disc bulges at several levels and a right disc herniation at L5-S1. However, Dr. Woodall never indicated claimant had similar disc bulges and herniations in

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[16] *Krueger v. Kwik shop, Inc.,* No. 113,418, 2016 WL 852938 (Kansas Court of Appeals unpublished opinion filed Mar. 4, 2016).

[17] *Hawkins, supra.*

his spine as were seen in 2005. Thus, claimant's accident did not solely aggravate, exacerbate or accelerate his preexisting back condition, but caused a new muscular injury.

Respondent argues claimant is not credible and that he lied to Ms. Chamberland and Dr. Boswell about not having a preexisting back condition. This Board Member disagrees. It is somewhat unusual that claimant would not remember an event as significant as an MRI or a back injury that was serious enough to warrant an MRI. Nevertheless, there is insufficient evidence in the record indicating claimant lied to Ms. Chamberland and Dr. Boswell, as opposed to being forgetful. This Board Member does not equate an extremely poor memory to lying.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[18] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated January 20, 2016, is reversed and remanded with instructions to consider claimant's request for medical treatment.

IT IS SO ORDERED.

Dated this _____ day of March, 2016.

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HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Bruce E. Moore, Administrative Law Judge

[18] K.S.A. 44-534a.